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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL.,
and MERRETT UNDERWRITING AGENCY
MANAGEMENT LIMITED, ET AL.,

Petitioners,

vs.

STATE OF CALIFORNIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR NATIONAL LEAGUE OF CITIES, NATIONAL SCHOOL BOARDS ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* SUPPORTING STATE RESPONDENTS

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Interests of the *Amici Curiae*

Amici curiae National League of Cities, National School Boards Association, and National Institute of Municipal Law Officers submit this brief for the Court's consideration.[1] *Amici* are not-for-profit organizations whose members consist of local government entities, and the administrators and legal officers who advise and govern them.

[1] This brief is being filed with the consent of the parties, whose letters of consent, signed by their representative Counsel of Record, have been filed with the Clerk of the Court.

The National League of Cities ("NLC") represents approximately 17,000 cities, towns and villages of all sizes. It serves its members as a national advocate in the legislative, administrative and judicial processes that affect them. It also develops national policy on municipal government needs, and offers training and research resources.

The National Institute of Municipal Law Officers ("NIMLO") is a non-profit, non-partisan organization which is dedicated to gathering and disseminating information on the most recent legal developments affecting municipalities. Its members include over 1500 municipalities, and over 17,000 attorneys are involved in NIMLO activities in their capacities as law officers of the respective members. NIMLO offers primary-source research services on various topics in municipal law; it also offers training seminars and litigation services to its members.

The National School Boards Association ("NSBA") is a federation of state associations of local school boards, the Hawaii State Board of Education, and the Boards of Education of the District of Columbia, the United States Virgin Islands and the Commonwealth of Puerto Rico. Representing over 15,350 local school boards, NSBA acts as a national advocate for its members on legislation and legal issues affecting local school boards. NSBA has a vital interest in matters affecting municipal law. For example, one of its largest member organizations, the New York State School Boards Association, Inc. ("NYSSBA"), is a not-for-profit corporate instrumentality of the public school districts of the State of New York, and represents approximately seven hundred forty (740) or ninety-four percent (94%) of such public school districts. Pursuant to section 1618 of the Education Law of the State of New York, NYSSBA has the responsibility of devising practical ways and means of attaining greater economy and efficiency in the administration of public school district affairs and projects.

Respondents' complaints allege that occurrence-based Commercial General Liability ("CGL") insurance, including the availability of policy forms providing insurance coverage for accidental pollution liability and defense costs, was severely restricted or became unavailable as a result of a coercive boycott

undertaken by the Petitioner domestic insurance companies and Petitioner foreign reinsurers, and that pollution and seepage coverage for property insurance was similarly restricted or made unavailable. The availability of such insurance, including coverage for accidental pollution liability, is a critical concern to local government entities.

For all practical purposes, local government entities are cut off from accidental pollution coverage altogether. *Amici curiae* have a substantial interest in the outcome of this case because it will materially affect the scope of market insurance coverage available to their members. Petitioners' actions have substantially reduced any opportunity which *Amici* previously enjoyed to secure accidental pollution insurance, and have significantly increased their insurance costs.

Summary of Argument

I. The McCarran-Ferguson Act, 15 U.S.C § 1012(b) (1988) ("McCarran") provides a federal antitrust exemption to the business of insurance only to the extent that such business is regulated by state law. The Ninth Circuit properly held that where regulated entities engage in injury-causing conspiratorial conduct with entities not subject to state regulations, the McCarran exemption does not apply. *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991). Here, the principal Petitioner domestic primary insurance companies, Hartford Fire Insurance Co., CIGNA Corp., Aetna Casualty and Surety Company, and Allstate Insurance Co., (collectively, "the Hartford Group"), are alleged to have engaged in a conspiracy with Petitioner foreign reinsurance companies ("the foreign reinsurers") who are not subject to state regulation. Because state regulation, as a constitutional matter, cannot extend to the conduct of the Petitioner foreign reinsurance companies, there can be no "state regulation" within the meaning of McCarran for the conduct engaged in by the Hartford Group jointly with the foreign reinsurance companies, and thus the McCarran safe harbor cannot apply.

II. The Ninth Circuit also correctly found that McCarran does not apply to the conduct alleged in Respondents' complaints

because the McCarran antitrust exemption does not apply to "any agreement to boycott, coerce or intimidate, or act of boycott, coercion, or intimidation." *Id.*, 938 F.2d at 927 (*quoting* 15 U.S.C. §1013(b)). The Ninth Circuit correctly found a boycott in the conduct undertaken jointly by the Hartford Group and the foreign reinsurers. As alleged in the Respondents' complaints, domestic primary insurance companies, other than the Hartford Group, were willing to sell insurance policies based on proposed insurance policy forms which had been filed or lodged by the Insurance Services Office, Inc. ("ISO") with each of the respective states in 1984. These 1984 forms provided coverage for accidental pollution claims, were written on an "occurrence" basis (rather than a "claims-made" basis), and did not include a defense cost cap.

The Hartford Group opposed the terms contained in the 1984 forms, and after the 1984 forms were filed with the respective states by ISO, the Hartford Group coerced ISO into withdrawing them. This result was achieved through a singularly effective method – the Hartford Group conspired with Petitioner foreign reinsurers in an effort to refuse to provide any reinsurance coverage for the 1984 forms. Without reinsurance, primary insurance companies, as a practical matter, were precluded from selling insurance pursuant to the 1984 forms. Thus, despite the fact that the insurance industry had committed to the 1984 forms, as evidenced by ISO's filing of those forms with the state insurance commissioners, the Hartford Group's boycott achieved its goal: in 1986, the 1984 forms were withdrawn and replaced with forms which were acceptable to the Hartford Group and the foreign reinsurers. To ensure absolute adherence to the 1986 forms, ISO was coerced into withdrawing rating and statistical support for the pre-1986 forms, which effectively foreclosed any underwriting of risks based on those earlier forms.

III. The doctrine of comity does not insulate the foreign reinsurers from federal antitrust liability because their efforts were specifically directed at domestic commerce, which they have gravely harmed. The conspiracy entered into by the foreign reinsurers with the Hartford Group compelled the domestic primary insurance companies to, among other things, exclude pollution

coverage from CGL policies, or lose reinsurance for such risks. Availability of reinsurance is essential for primary insurance coverage; thus reinsurers can restrict the behavior of primary carriers, and control the destiny of their policyholders. While Petitioners' conspiracy was in progress, the president of one primary insurance company admitted that reinsurers exert critical control:

> Lack of reinsurance forced two insurers to temporarily stop writing liability coverage for public entities earlier this year. Forum Insurance Co. in Schaumburg, Ill. stopped underwriting public officials liability coverage for three months until this summer when it found reinsurance in London. . . . Calvert Insurance Co. in New York City also quit writing public entity liability coverages in January after losing its reinsurance, but resumed underwriting July 1 after securing reinsurance, said President and Chief Executive Officer John H. Walton. . . . "Our terms are dictated by our reinsurers," he commented.

M. Fletcher, *Public Entity Dilemma: Go Bare Or Bust*, Business Insurance, July 8, 1985, at 1.

The Petitioner Hartford Group and Petitioner foreign reinsurers seek to justify their conduct leading to the 1986 ISO forms revisions as simply an agreement on rates and terms protected by McCarran, but this completely ignores the unlawful manner in which such "agreement" was reached. The Respondents properly allege that the "agreement" as evidenced in the 1986 form filings was arrived at by anticompetitive conduct which is not protected by McCarran.

ARGUMENT

I. PETITIONERS FORFEITED ANY ANTITRUST IMMUNITY AVAILABLE TO THEM UNDER THE McCARRAN-FERGUSON ACT.

The McCarran Act provides insurance companies with immunity from antitrust laws on three conditions. In order to enjoy McCarran's protection, the Hartford Group must show: (1) that they are engaged in the business of insurance; (2) that their

actions are regulated by state law; and (3) that they have not engaged in any act of boycott, coercion or intimidation. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 124 (1982).

A. *An Insurance Company That Is Shielded From Antitrust Prosecution By The McCarran-Ferguson Act Loses That Protection When It Colludes With A Non-Exempt Party In Unregulated Injury-Causing Conduct.*

The Hartford Group assert that so long as they remain in "the business of insurance"[2] and are regulated by state law, McCarran protects any activities "*necessary and incidental*" to the business of insurance. Brief for the Petitioners Hartford Fire Insurance Co., *et al.* at 34 (emphasis added) (hereinafter "Hartford Br. at ____"). By that hazy standard, every business decision made by a member of the Hartford Group is arguably "incidental" to the business of insurance; neither Congress nor this Court has construed McCarran protection so liberally. Congress did not "exempt the business of *insurance companies* from the antitrust laws. It exempted only 'the business of *insurance*.' " *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 219 n.18, *reh'g denied*, 441 U.S. 917 (1979) (emphasis added). Congress's overriding concern was diminution of a state's ability to oversee ratemaking and policy formulation. *Group Life*, 440 U.S. at 224. When the Hartford Group conspired with foreign reinsurers as alleged in the Respondents' complaints, they attempted to thwart state authority because the foreign reinsurers stand outside the regulatory control of the respective states.

The members of the Hartford Group cannot defend their conduct as regulated by state law because no state insurance commissioner controls the activity of the foreign reinsurers in which the Hartford Group participated. The Hartford Group engaged in unregulated conduct jointly "with nonexempt parties," that allegedly caused antitrust injury. *Group Life*, 440 U.S. at 231. McCarran does not extend to agreements between

[2] To rule that McCarran protects conduct involving the "business of insurance," a court must find that the disputed practice: (1) effectively transfers or spreads

(Footnote continued)

regulated and unregulated insurance companies, pursuant to which they jointly undertake unregulated conduct which causes antitrust injury.[3]

In *Group Life*, an insurance company offered policyholders a discount on prescription drugs purchased at participating pharmacies; non-participants brought an antitrust claim against the insurance company, and alleged that this marketing plan dissolved McCarran immunity. The insurance company argued that the purchase plan spread risk by reducing policyholders' costs, but the Court rejected that point, and held that the insurance company forfeited its McCarran shield by combining with pharmacies which did not hold a corresponding McCarran exemption, and engaging in unregulated conduct with them. *Id.* at 211, 214-16. Three years later in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), the Court denied McCarran protection for a chiropractors' peer review committee which evaluated policyholders' treatment costs, because the chiropractors who made insurance claims determinations were themselves unregulated entities. *Id.* at 132-33.

The instant case involves another facet of the analysis used in *Group Life*. Though the Hartford Group is regulated by state insurance law, the foreign reinsurers are not, and the conspiratorial conduct engaged in by the Hartford Group and the foreign reinsurers jointly is beyond the reach of state regulation within the meaning of McCarran.

Contrary to the Hartford Group's argument, this conduct-based analysis does not bar a domestic insurance company from consulting with unregulated parties such as consumers, corporate risk managers or even foreign reinsurers, on drafting insurance rates or terms generally. Hartford Br. at 21. Such conduct only

a policyholder's risk; (2) is an "integral part of the insurance policy relationship" between insurance company and policyholder; and (3) is limited to parties which function within the insurance industry. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

[3] *See also SEC v. National Sec. Inc.*, 393 U.S. 453, 459-60 (1969). McCarran does not shield every business decision rendered by an insurance company as the "business of insurance." In this case, McCarran did not bar an SEC challenge to a proposed merger based on fraudulent misrepresentation.

runs afoul of the Sherman Act where, as here, joint efforts involve unregulated conduct that results in antitrust injury. *See also Beltz Travel Serv., Inc. v. International Air Transport Ass'n*, 620 F.2d 1360, 1366-67 (9th Cir. 1980) ("[T]he action of any of the conspirators to restrain or monopolize trade is, in law, the action of all.").

B. The Respective States Cannot Constitutionally Exercise Authority Over The Petitioner Foreign Reinsurers.

Because state law, as a constitutional matter, cannot extend to the conduct of the foreign reinsurance companies, there exists no "state regulation" within the meaning of the McCarran Act over the Hartford Group's joint conspiracy with the foreign reinsurers.

If neither party to a reinsurance contract is a domiciliary of the state in which an occurrence arises or a policyholder resides, and if the reinsurance contract was negotiated and executed in another jurisdiction abroad, that state will lack sufficient contacts with the reinsurer to enable it to exercise regulatory authority over the reinsurer's activity. A state's constitutional power to govern occurrences beyond its boundaries turns on its ability to govern the transaction or status from which that extraterritorial event flowed. *Alaska Packers Association v. Industrial Accident Commission of California*, 294 U.S. 532 (1935) upheld the state of California's power to exercise jurisdiction over a workers' compensation dispute involving a Mexican worker, hired in California but injured in Alaska, because the employment contract was executed in California, and was governed by state employment law. "[W]here the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligations and its sanctions are subject, in some measure, to the legislative control of the state." *Id.* at 540-41. Due process accords a state the power to "effect legal consequences" of a dispute arising out of a contract executed pursuant to its law, or "if it has control over the status which gives rise to those consequences." *Id.*

Although McCarran *recognizes* a state's authority to regulate the business of insurance, it did not *grant* the several states authority over extraterritorial insurance business. *State Board*

of Insurance v. Todd Shipyards Corp., 370 U.S. 451, 456 (1962) held that the state of Texas had no power to levy a tax on an insurance premium paid to an out-of-state insurance company by a New York corporation which did business in Texas. The insurance contracts were negotiated and paid out-of-state, and losses were investigated, adjusted and paid out-of-state, though the risk was located in Texas. Insufficient Texas contacts existed to justify exercise of its taxing authority over the distant insurance transaction. The Court held that, according to the limits set by the Commerce Clause, McCarran does not authorize a state's extraterritorial control over foreign insurance contracts.

The *Todd* Court noted that McCarran maintained the limits of state regulatory authority as set forth in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922); and *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1938). In *Connecticut General Life*, the Court invalidated a California state tax on reinsurance for primary insurance policies written in California, but paid in Connecticut, as follows:

> All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state.

Id. at 82. *See also FTC v. Travelers Health Ass'n*, 362 U.S. 293, 300 (1960) (a single state's unfair trade law could not constitute regulation of interstate mail order insurance business, and therefore did not oust jurisdiction of Federal Trade Commission).* The control of each state over the foreign reinsurers' transactions is similarly limited. The foreign reinsurers certainly sell

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* On the other side of the coin, application of a single state's insurance law to govern disputes over contracts executed by parties in distant jurisdictions threatens to work the "unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated." *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649 (1950).

reinsurance to American clients on risks located within the United States. Joint Appendix of Petitioners and Respondents at 21-22 (hereinafter "J.A. at ____"). However, there is nothing in the record to indicate that these reinsurers maintain local agents or other representatives sufficient to enable the respective states to effect "control" over their reinsurance of risks based in America. *See* J.A. at 18-19, 73. *See also Alaska Packers*, 294 U.S. at 540-41.

As a practical matter, the respective states are powerless to enforce local laws against the foreign reinsurers because state regulatory structures are designed to operate within the constitutional limits discussed above. As an example, New York insurance laws cannot control activities "effected by mail from outside this state by an unauthorized foreign or alien insurer duly licensed to transact the business of insurance in and by the laws of its domicile . . . " New York Ins. Law § 1101(b)(2). The record does not suggest that the foreign reinsurance companies are licensed in any of the respective states. J.A. at 197-98, 212-13. Moreover, a recent GAO report to Congress acknowledged that states lack authority to regulate an out-of-state reinsurer's solvency. United States General Accounting Office, Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, *Insurance Regulation: State Reinsurance Oversight Increased But Problems Remain* at 24-25 (May 1990). *See also id.* at 14-23, 25-30.

Congress passed the McCarran Act to enable state governments to regulate insurance, and to create a limited pocket of antitrust protection for legitimate joint efforts which are peculiar to "the business of insurance." When the Hartford Group entered into a conspiracy with the unregulated foreign reinsurers to coerce the withdrawal of the 1984 ISO filings, they lost their McCarran immunity because the states do not have the jurisdiction to regulate such joint conduct.

II. PETITIONERS' CONDUCT AMOUNTS TO "BOYCOTT" AND "COERCION" AND THUS IS NOT PROTECTED BY THE McCARRAN ACT.

An insurance company also forfeits its McCarran exemption by engaging in "boycott, coercion, or intimidation." 15 U.S.C. 1013 (b). This Court has held that the McCarran analysis of an alleged boycott uses the same standard as applied in examinations of alleged boycotts within the meaning of the Sherman Act: "a method of pressuring a party with whom one has a dispute by withholding, or *enlisting others to withhold*, patronage or services from the target." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 542 (1978) (emphasis added). The *Barry* Court refused to expand McCarran's protection of the insurance industry beyond its plain meaning:

> The language of § 3(b) is broad and unqualified; it covers "any" act or agreement amounting to a "boycott, coercion, or intimidation." If Congress had intended to limit its scope . . . it would have made this explicit. While the legislative history does not point unambiguously to the answer, it provides no substantial support for limiting language that Congress itself chose not to limit.

Id. at 550-51.

Respondents' complaints state that the Hartford Group agreed to boycott insurance companies who were willing to offer "occurrence" terms and more liberal pollution coverage than the restrictive policy terms which the Hartford Group favored. J.A. at 25-32, 77-80. To ensure that no competitor of the Hartford Group could offer such coverage, Respondents' complaints allege that the Petitioner Hartford Group conspired with the Petitioner foreign reinsurers to deny reinsurance to such competitors of the Hartford Group. J.A. at 31-32. Respondents further allege that the Hartford Group and the foreign reinsurers wielded their combined power to force ISO to withdraw the statistical support for its earlier policy terms, which ISO had published for many years, and which was essential to any CGL underwriter.

In fact, ISO withheld this data although some of its members depended on it. J.A. at 32-33. Thus Petitioner Hartford Group locked its potential competitors in a steel trap, cutting them off from two elements essential to any underwriter: statistical data upon which to calculate risks, and reinsurance to spread those risks.

ISO is the dominant ratings service in the insurance industry, and no other service matches its data bank; though ISO no longer publishes claims data on pre-1984 policies, it continues to maintain that information. J.A. at 19-20. There is no legitimate business purpose in ISO's withholding such a vital element of commerce from its members; so long as that ratings data is hidden from any insurance company who wishes to service the market for accidental pollution coverage, the Hartford Group's domination is secure. No competitor can offer accidental pollution coverage under terms which they disfavor; local government entities lack complete data upon which to project their own self-insurance costs, and even Congress has limited information for analyzing compliance with federal environmental law. *See, e.g.*, United States General Accounting Office, Report to the Congress, *Hazardous Waste: Issues Surrounding Insurance Availability* at 4-5, 28-31, 52-53, 75-77, 82-84 (October 1987).

The Hartford Group's boycott matches the features described in *Barry*; their agreement with the foreign reinsurers was "*a method of pressuring*" competitors who were willing to sell insurance coverage pursuant to the 1984 forms filed with the states. They "*enlisted others*" (the foreign reinsurers) "*to withhold patronage or services*", such as reinsurance, from those potential competitors. The foreign reinsurers and the Hartford Group applied a comparable "pressure" against ISO members to capitulate to their demands that ISO renounce its 1984 filings and substitute the 1986 forms. Similarly, to ensure that only the 1986 forms would be used, ISO was coerced by all the Petitioners to "withhold services" by withdrawing its statistical and rating support for the earlier forms. Thus the boycott created by the Hartford Group and the foreign reinsurers is exactly the coercive behavior which the *Barry* court condemned. *Compare*

Feinstein v. Nettleship Co. of Los Angeles, 714 F.2d 928 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984) which upheld an agreement whereby medical malpractice insurance companies offered coverage solely to members of a physicians' association as a risk-spreading and risk-reduction mechanism. The high potential exposure inherent in such underwriting justified the arrangement.[5]

The foreign reinsurers' muscle is obvious; it is neither reasonable nor necessary to the "business of insurance" for influential players to foreclose such essential elements of commerce. The reinsurers' hammerlock on the Hartford Group's competitors corresponds to the restraint against consumers condemned in *Barry*. The strategy hatched by all the Petitioners is a refusal to deal with the proponents of the 1984 ISO forms; it attempts to manipulate McCarran to swallow the Sherman Act, and is a long way from the legitimate joint activity which McCarran protects. McCarran protects the domestic insurance companies' agreement to file the 1984 ISO forms, but the 1986 forms did not result from a similarly collegial consensus; ISO's "agreement" to revoke their 1984 filings and substitute the 1986 forms was solely the result of the boycott. J.A. at 27-30, 32-33.

The Hartford Group contends that they did nothing more than treat everyone on the same terms, limiting coverage for all clients. Hartford Br. at 36. However, Respondents' pleadings assert that the Hartford Group and the foreign reinsurers publicly threatened to withhold reinsurance from those domestic insurers who were willing to offer insurance coverage on pre-1986 terms, not from the entire market. J.A. at 25-27. Respondents' allegations also are reflected in a GAO Congressional report, which discovered that certain domestic insurance companies:

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[5] Moreover, that agreement was clearly regulated by state insurance laws, as it ran between an insurance company and its policyholders, and policyholders had ample opportunities to secure comparable coverage from other vendors; thus the court found no corruption of McCarran's protection. *Feinstein*, 714 F.2d at 932-33.

> . . . acknowledged writing pollution coverage to some extent . . . [as] an accommodation to selected clients or continuation of a few older accounts. . . . We were told by industry representatives that quite a few other reinsurers may write this business [reinsurance for pollution liability] but that the companies would not be willing to admit it because they would not want their other customers coming to them to reinsure pollution risks.

United States General Accounting Office, *Report to the Congress, Hazardous Waste: Issues Surrounding Insurance Availability* at 22-23 (October 1987). This report also calls into question the credibility of the Hartford Group's assertion that reinsurance was offered on an equal basis throughout the market. Hartford Br. at 39.

The Hartford Group's brief presents a false challenge: they argue that the conduct alleged by Respondents does not amount to a boycott and does not rise to the level of an absolute refusal to deal, as in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, *reh'g denied*, 323 U.S. 811 (1944) ("*SEUA*"), which the Hartford Group claims is necessary to establish an insurance boycott under McCarran. Hartford Br. at 13. But this argument is without substance. As the Ninth Circuit held, establishing that a boycott exists is not predicated by finding an absolute refusal to deal. Rather, as held by the Ninth Circuit, "[t]he evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms." *In re Insurance Antitrust Litigation*, 938 F.2d 919, 930 (9th Cir. 1991).

In any event, despite the Hartford Group's protests to the contrary, it is apparent from the record that the Hartford Group and the foreign reinsurers absolutely refused to deal with any primary carrier willing to sell insurance coverage pursuant to the 1984 filings. Thus, as found by the Ninth Circuit, a boycott was implemented. *See also Barry*, 438 U.S. at 544 ("boycotts are

not a unitary phenomenon"). Respondents' allegations that the boycotters conspired to withhold reinsurance in order to squelch Hartford's would-be competitors are sufficient to warrant a finding of antitrust violation. J.A. at 31-32, 41-49.

The Ninth Circuit and the district court both found that the direct effect of the boycott was to "restrain the availability of desired coverages in the markets in which plaintiffs purchase insurance." *In re Insurance Antitrust Litigation*, 938 F.2d. at 926; *In re Insurance Antitrust Litigation*, 723 F. Supp. 464, 483 (N.D. Cal. 1989). This conclusion comports with the boycott analysis developed by this Court over several decades. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457 (1941). Congress foresaw the dangers of actions similar to this cartel when it debated the proposed McCarran legislation:

> [A]ny attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision.

J.A. at 222 (*quoting* remarks of Senator O'Mahoney, 91 Cong. Rec. 1481 (1945)). The Hartford Group warns that the Ninth Circuit's decision threatens the economic viability of the insurance industry. Hartford Br. at 48-49. But this Court has long regarded such grim prophecies with a skeptical eye. As the first Justice Harlan noted sardonically:

> It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions.

Northern Sec. Co. v. United States, 193 U.S. 197, 351 (1904) (Harlan, J.).

III. THE PETITIONERS' COERCIVE BOYCOTT ENJOYS NO PROTECTION UNDER THE DOCTRINE OF COMITY DUE TO ITS DIRECT, FORESEEABLE, AND SIGNIFICANT EFFECTS ON DOMESTIC TRADE.

The Ninth Circuit identified one factor which weighs in favor of abstention on the basis of comity: a perceived "conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance." *In re Insurance Antitrust Litigation*, 938 F.2d 919, 934 (9th Cir. 1991) (*citing Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976), *appeal after remand*, 749 F.2d 1378 (9th Cir. 1984) ("*Timberlane II*"), *cert. denied*, 472 U.S. 1032 (1985)). But *Timberlane*'s balancing test dictates that when a foreign entity's conduct in the United States has direct, foreseeable and significant effects on domestic commerce, comity will not justify abstention. 749 F.2d at 1383-85.

Petitioners claim that it is perverse to hold the foreign reinsurers liable for antitrust violations if their actions are customary and legal at home. Brief for Petitioner Sturge Reinsurance Syndicate Management Limited at 18-21. But the foreign reinsurers set their sights directly upon domestic commerce. When the foreign reinsurers used the threat of a reinsurance boycott to intimidate the members of ISO into adopting the terms the Hartford Group favored in 1986, pollution coverage became extremely difficult for many policyholders to secure, and virtually nonexistent for municipalities and other local government entities.[6] When a foreign entity directs its commercial efforts to the American market, an intent to affect that market can be inferred, sufficient to establish subject matter jurisdiction. *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-45 (2d Cir. 1945) ("*Alcoa*"). *See also Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). The fact that the

[6] *See, e.g.*, M. Fletcher, *Liability Market Shrinking For Public Entities*, Business Insurance, Oct. 8, 1984, at 1, 30 (detailing various insurance companies which stopped providing liability coverage for public entities in the mid-eighties).

foreign reinsurers' actions had significant effect on domestic commerce, plus their specific intent to reach that market, undermines the doctrine of comity as a defense to their actions.

Coverage for pollution liability was severely restricted or unavailable following the Hartford Group's coercive action with the foreign reinsurers. J.A. at 45-46, 87-98. This precipitous loss of coverage wrought havoc in municipal budgets. In addition, as a Congressional study panel noted, CGL policy changes constrict competition at the same time insurance companies raise premiums. United States General Accounting Office, *Briefing Report to Congressional Requesters, Liability Insurance: Changes in Policies Set Limits on Risks to Insurers* at 19 (Nov. 1986).[7]

[7] In a 1987 report to Congress, the United States General Accounting Office noted that loss of pollution coverage has had significant consequences for enforcement of federal environmental laws:

> Pollution liability insurance continues to be generally unavailable. Although more than 100,00 companies generate, handle, or dispose of hazardous substances, few of them have insurance for pollution risks.
>
> GAO's survey of pollution claims closed in 1985 showed that insurers were generally not making high claims payments at that time. However, these claims are not necessarily indicative of the eventual magnitude of the insurance industry's pollution claims payments. Data on pollution claims closed after 1985 would be needed to establish trends in pollution claims payments. Currently, there is no central information source to capture data on all pollution claims.

United States General Accounting Office, *Report to the Congress, Hazardous Waste: Issues Surrounding Insurance Availability* at 2-3 (Oct. 1987). GAO indicated that its report, issued at the request of Congress upon enactment of the 1986 Superfund Amendments, suffered because insurance companies were incommunicative: many of them failed to respond to GAO's survey with information on pollution claims paid or pending, nor did they provide data on their reserves for pending pollution claims. GAO reiterated these criticisms in subsequent reports to Congress. *See, e.g., Hazardous Waste: Pollution Claims Experience of Property/Casualty Insurers* at 1-3, 5-6 (Feb. 1991); *Insurance Regulation: State Reinsurance Oversight Increased, but Problems Remain* at 14-16 (May 1990).

The Hartford Group and the foreign reinsurers seek an unwarranted liberalization of the McCarran exemption. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 127 (1982). If this Court reverses the Ninth Circuit's decision, it will allow insurance companies to circumvent the states' regulatory authority. This recalls President Roosevelt's warning when he signed the McCarran Act: "Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. at 224, *quoting* S. Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt, Vol. 1944-45 p. 587 (1950).

Congress never intended to allow domestic insurance companies to employ foreign reinsurance agents in order to circumvent state insurance laws, as has happened here. Such reinsurers could operate a private rating system, running parallel to state statutory schemes, but beyond the reach of a state's enforcement powers. As the Ninth Circuit found, ". . . the defendants have gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered." *In re Insurance Antitrust Litigation*, 938 F.2d 919, 930 (9th Cir. 1991).

If this Court reverses the Ninth Circuit's decision, nothing would prevent regulated domestic insurance companies from using similar coercive techniques involving unregulated foreign reinsurers, to limit other types of coverage, even if some primary insurance carriers were willing to provide it. This Court should affirm the Ninth Circuit's decision.

CONCLUSION

For the reasons stated above, *Amici* respectfully request that this Court affirm the decision of the Ninth Circuit.

Respectfully submitted,

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